2000

Painewebber Inc, Kidder Peabody and Co., Inc., and Van Francis Dunn, Jr. v. The Robertson Family Trust, by and through James L. Robertson : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

PAINEWEBBER, INC., a Delaware Corporation, KIDDER PEABODY & CO., INC., a Delaware Corporation, and VAN FRANCIS DUNN, JR., an individual,

Plaintiffs/Appellees,

vs.

The ROBERTSON FAMILY TRUST, by and through JAMES L. ROBERTSON, Trustee,

Defendant/Appellant.

APPELLANT'S BRIEF

Case No. 20000043-~~SC~~ CA

Nature of Proceeding:
Appeal from the Third Judicial District Court, Salt Lake County, State of Utah
Honorable Sandra N. Peuler, Presiding

Argument Priority
Rule ~~14~~ 15

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Defendant/Appellant
Requests Oral Argument and a Published Opinion

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JURISDICTIONAL STATEMENT

Jurisdiction of the Third Judicial District Court, Salt Lake County, Utah from which this appeal arises, is based on U.C.A. 78-3-4(1)(1953, as amended).

Jurisdiction to hear this appeal is conferred upon the Utah Supreme Court pursuant to Article VIII, Section 5 of the Constitution of the State of Utah, U.C.A. 78-2-2(3)(j)(1995 Supp.) and Rule 3(a) of the Utah Rules of Appellate Procedure. This case was poured over to the Court of Appeals by the Supreme Court on March 31, 2000.

STATEMENT OF ISSUES AND STANDARD OF REVIEW

1. Was it reversible error for the District Court to deny the Robertson Family's Motion for an Extension of Time to File a Notice of an Appeal when the evidence demonstrated that the clerk of the court had misinformed counsel for the Robertson Family, resulting in the filing of a Notice of Appeal one day after the time to file such a notice had expired, and clearly constituting detrimental reliance and excusable neglect?

Standard of Review: Because the District Court's ruling was a legal, rather than a factual, conclusion, this Court reviews the District Court's decision for correctness. West v. Grand County, 942 P.2d 337, 339 (Utah 1997).

2. Was it reversible error for the District Court to deny the Robertson Family's Motion to Reconsider the District Court's denial of the Robertson Family's Motion to for

an Extension of Time to File Notice of Appeal, pursuant to Rules 59 and 60, when the evidence demonstrated that the Robertson Family's one day delay in filing its Notice of Appeal was clearly the result of detrimental reliance and excusable neglect on the part of its counsel, and there was an insufficiency of evidence to justify the Court's denial of the Robertson Family's Motion for an Extension of Time and/or said denial was an error in law? Further, was it error for the District Court to deny the Robertson Family's Motion to Reconsider, under the lenient standards of Rule 60, when the conduct of counsel for Robertson Family clearly constituted excusable neglect, such that the Court's denial of the Motion to Reconsider was an abuse of discretion.

Standard of Review: The District Court's ruling in denying Defendant's Motion to Reconsider pursuant to Rules 59 and/or 60 will be reviewed under an abuse of discretion standard by this Court. Hart v. Salt Lake County Commission, 945 P.2d 125, 135 (Utah App. 1997); Classic Cabinets, Inc. v. All American Life Ins. Co., 978 P.2d 465, 467 (Utah App. 1999).

STATEMENT OF THE CASE

This action arises out of an arbitration claim filed by the Robertson Family with the National Association of Securities Dealers (NASD) seeking damages on the grounds that plaintiffs PaineWebber, Inc., Kidder, Peabody & Co., Incorporated and Van F. Dunn (the "Plaintiffs") recommended and sold to the Robertson Family inappropriate investments. In a desperate attempt to avoid arbitrating the Robertson Family's claim as

required by the NASD, the Plaintiffs filed an action in the Third District Court, the Honorable Dennis M. Fuchs presiding, seeking a temporary and permanent stay of the NASD arbitration, on the grounds that the Robertson Family's claim was not filed with the NASD within six years of its investment as required by §10304 of the NASD Code of Arbitration Procedure.

The Robertson Family opposed the Plaintiffs' request for a temporary stay, and filed a motion to dismiss the Plaintiffs' Complaint on the grounds that the NASD, and not the Utah District Court, should determine the meaning and application of §10304 of the NASD Code of Arbitration Procedure. Apparently finding that the NASD was not the appropriate body to determine the meaning of its own rules of arbitration procedure, the District Court granted the Plaintiffs' request for a temporary stay, and denied the Robertson Family's motion to dismiss.

Before the Robertson Family had an opportunity to perform discovery, the Plaintiffs filed a motion for summary judgment on one ground: that the Robertson Family's claim is barred because §10304 of the NASD Code of Arbitration Procedure provides that claims based upon events occurring more than six years prior to the filing of the claim are not eligible for arbitration. The Plaintiffs argued that all events giving rise to the Robertson Family's Claim occurred in 1981, "over sixteen years prior to the filing of the claim," and thus that §10304 bars the Claim.

In response to the Plaintiffs' motion for summary judgment, the Robertson Family

disputed the assertion of the Plaintiffs, and argued that all events giving rise to the Robertson Family's Claim did not occur until October 1992; thus, the Robertson Family's Claim was filed within the six year period of §10304. Moreover, even if the six year period of §10304 began to run earlier than October 1992, argued the Robertson Family, §10304 is a statute of limitations that is tolled by Utah's "discovery rule." Thus, because Mr. Robertson did not become aware that the Robertson Family would lose all of its investment until October 1992, the six year time period of §10304 was tolled until that date. In addition, the Robertson Family requested that the Court deny or continue the Plaintiffs' motion for summary judgment and allow the Robertson Family to perform discovery as allowed by U.R.C.P. 56(f), and filed an Affidavit of James L. Robertson in support of such request.

The District Court granted the Plaintiffs' motion for summary judgment, and, unknown to the Robertson Family and its attorney, the Court entered its Final Order February 8, 1999.

On or about March 9th, 1999, twenty-nine days after entry of the final order, Brian W. Steffensen, legal counsel for the Robertson Family, called Judge Fuch's clerk at the Third Judicial District Court of Salt Lake County and inquired if the District Court had entered its Final Order. The Robertson Family's attorney made this inquiry because he had not received notice from the District Court as to whether the Final Order had been entered, even though the plaintiffs/appellees had filed their proposed form of order with

the Court. At that time, the clerk incorrectly informed the Robertson Family's attorney that the Court had issued its Final Order on February 10, 1999. Because the District Court did not send to the Robertson Family's attorney a copy of the Final Order, he had not previously been aware that the Court had issued the Final Order.

Therefore, based on the representation of the District Court's Clerk, counsel for the Robertson Family calculated that the Robertson Family had thirty days from February 10, 1999, in which to file a Notice of Appeal to appeal the District Court's rulings and orders in this action. In other words, it was counsel's understanding that the Robertson Family had until March 12, 1999 in which to file its Notice of Appeal. Therefore, Mr. Steffensen executed a Notice of Appeal and gave it to his secretary for filing on Wednesday, March 10, 1999, instructing her to file it with the District Court that day together with the appropriate fee. However, counsel's secretary apparently did not cause the Notice of Appeal to be filed with the District Court until the next day, March 11, 1999, because she did not believe that the deadline for filing would run until Friday, March 12, 1999.

Counsel for the Robertson Family instructed his secretary to pay the appropriate filing fee, and assumed that when his messenger filed the Notice of Appeal with the District Court, that the appropriate filing fee was in fact paid, because the office of the Clerk of the District Court accepted the Notice of Appeal and filed the same. However, on March 18, 1999, Wendy Purnell, the front office clerk of the Judge Fuchs, telephoned

the Robertson Family's attorney, and told him that she could not docket the Robertson Family's Notice of Appeal because the requisite filing fee had not been filed. Therefore, counsel immediately filed an Amended Notice of Appeal on March 18, 1999, and filed it with the District Court along with the requisite filing fee.

The Utah Court of Appeals then transferred the case to the Utah Supreme Court for decision, where the Plaintiffs filed a Motion for Summary Disposition on the Grounds that the Robertson Family had not filed their Notice of Appeal within 30 days as required by Utah R. App. Proc. 4(a). The Supreme Court granted the Plaintiffs' Motion for Summary Disposition by its Order dated June 1, 1999. In its Order, the Supreme Court stated that "Plaintiffs' motion for summary dismissal is granted. Defendant filed its appeal one day late, and this court lacks jurisdiction over the case. Defendant's remedy lies with the district court if it seeks an extension of time in which to renew its appeal."[1]

On June 23, 1999, the Robertson Family filed a Motion for An Extension of Time in Which to File notice of Appeal. The Robertson Family argued, and provided affidavits of counsel, demonstrating that counsel had been misinformed by the clerk of the Court as to the date the Order granting the Motion for Summary Judgment had been entered, thereby causing a calendaring error by counsel for the Robertson Family. The Notice of Appeal would have been timely filed had the information from the Clerk of the Court been accurate. However, as the information was inaccurate, the Notice was filed one day

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[1]Order of the Utah Supreme Court dated June 1, 1999 (Index No. 195).

late. The Robertson Family Trust argued this was clearly excusable neglect on the part of its counsel and as such they should be permitted to file the Notice of Appeal. On September 9, 1999, the Court denied the Robertson Family's Motion for an Extension of Time on the grounds that it was not excusable neglect.

On September 13, 1999, the Robertson Family timely moved the Court to reconsider, pursuant to U.R.C.P. Rules 59 and 60, its ruling denying the Motion for an Extension of Time. On December 8, 1999, the Court denied the Robertson Family's Motion to Reconsider and entered an order to that effect.

The present Appeal was then filed.

STATEMENT OF FACTS

1. On March 10, 1998, the Robertson Family filed its verified Claim with the NASD. The claim is verified by James L. Robertson. The plaintiffs attached to their memorandum in support of their motion for summary judgment a true and correct copy of the verified Claim and they stipulated that the facts contained in the verified Claim were undisputed.[2]

2. During 1981, Mr. Robertson sold some shares of stock that resulted in a profit that was unusually large for him. His broker in selling the stock was an acquaintance of

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[2]Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Summary Judgment, p. 5. (Index No. 78)

his, Van F. Dunn, who was an account executive at Kidder, Peabody & Co., Inc.[3]

3. Because of his unusually large gain from the sale of stock, in the Spring of 1981, Mr. Robertson met with Mr. Dunn to discuss whether a tax shelter investment would be suitable for him. During this meeting Mr. Robertson told Mr. Dunn that because of the recent sale of stock, and because he would be selling more stock in the near future, his income during 1981 would be unusually high. Mr. Robertson asked Mr. Dunn if he knew of a good tax shelter investment that would not only shelter his income in 1981, but that would turn a profit in a fairly short time period, or around five years. Mr. Robertson also told Mr. Dunn that he needed the safest possible investment. Moreover, Mr. Robertson told Mr. Dunn that he had not been in a 50% tax bracket before 1981, and that he didn't expect to be in the 50% tax bracket in the future.[4]

4. In response to Mr. Robertson's inquiry about the safest possible investment, Mr. Dunn recommended an investment in Lauren Plaza Associates, Ltd. ("Lauren Plaza"), an Illinois Limited partnership that was financing a shopping center in Louisiana. Mr. Dunn indicated that because Lauren Plaza contemplated selling its investment in the shopping center within approximately five years, that an investment in the partnership would: 1) shelter income in the short term, and 2) result in a profit within a fairly short

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[3]Affidavit of James L. Robertson in Opposition to Motion for Summary Judgement ("Robertson Affidavit"), ¶ 2, (Index No. 127).

[4]Plaintiff's Memorandum of Points and Authorities in Support of Motion for Summary Judgment, Exhibit A, ¶2 (Index No. 83); Robertson Affidavit, ¶3, (Index No. 127).

time.[5]

5. Because Mr. Robertson did not feel comfortable simply relying on his own judgment before making an investment in the Lauren Plaza, he had his accountant, E. Dickson Adams, meet with Mr. Dunn to discuss the investment. Mr. Dunn convinced Mr. Adams that the Lauren Plaza was not only suitable for Mr. Robertson, but also that Mr. Robertson should purchase two units in the Lauren Plaza, rather than just one, for a total price of $158,000.00.[6]

6. Because of Mr. Dunn's recommendation, and in reliance upon Mr. Dunn's recommendation, Mr. Robertson purchased two shares in the Lauren Plaza, for a total price of $158,000.00.[7]

7. Subsequent to his investment in the Lauren Plaza, Mr. Robertson transferred his ownership of the Lauren Plaza shares to the Robertson Family Trust, and he is the trustee for the trust.[8]

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[5]Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Summary Judgment, Exhibit A, ¶3 (Index No. 84); Robertson Affidavit, ¶4, (Index No. 127).

[6]Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Summary Judgment, Exhibit A, ¶4 (Index No. 84); Robertson Affidavit, ¶5, (Index No. 127-28); Affidavit of E. Dickson Adams, ¶¶1-7, (Index No. 123-24).

[7]Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Summary Judgment, Exhibit A, ¶5, (Index No. 84); Robertson Affidavit, ¶6, (Index No. 123-24).

[8]Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Summary Judgment, Exhibit A, ¶6, (Index No. 84-85); Robertson Affidavit, ¶7, (Index

8. In 1984, Mr. Robertson contacted the general partner in the Lauren Plaza, Balcor Management Services, Inc., and asked about the appreciated value of the partnership based on the 98% occupancy level supposedly being maintained in the shopping center. Balcor did not opine as to the value of the partnership or its shares because there was no plan to sell the shopping center; therefore, no appraisal was available.[9]

9. In 1986, Mr. Robertson was informed by Balcor Management Services, Inc., that although the occupancy level in the shopping center was 97% problems had developed, and there were no plans to sell the property at that time.[10]

10. Nonetheless, in every annual report after 1986, Balcor continued to express optimism. In fact, in 1989, Balcor reported rents were being collected on 95% of the property. In the November 1990 report, Balcor states, "...net cash flow is ahead of our projection for the year."[11]

No. 124).

[9]Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Summary Judgment, Exhibit A, ¶7, (Index No. 85); Robertson Affidavit, ¶8, (Index No. 128).

[10] Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Summary Judgment, Exhibit A, ¶8 (Index No. 85); Robertson Affidavit, ¶9, (Index No. 128).

[11] Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Summary Judgment, Exhibit A, ¶9 (Index No. 85); Robertson Affidavit, ¶10 (Index No. 128).

11. In the 1991 annual report, Balcor states, "Our original intention was to hold the property for five to ten years from acquisition in 1981, or until such time as a sale or refinancing would meet the partnership's objectives. We are now in the twelfth year of the holding period, and we anticipate holding the property an additional two to three years, assuming a loan modification is negotiated."[12]

12. Mr. Robertson reviewed these annual reports and relied upon them as indicating that his investment was still safe.[13]

13. However, in a letter to the shareholders dated October 1992, Balcor wrote, "A foreclosure sale has been scheduled for October 21, 1992, at which point we expect the partnership to relinquish title to this property." Because of the foreclosure on the Lauren Plaza, the Robertson Family lost $154,050.00 ($158,000.00 invested less $3,950 cash distributions).[14] Mr. Robertson did not know that his investment in Lauren Plaza would be valueless until he was notified of the foreclosure sale by Balcor's October 1992 letter.[15]

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[12]Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Summary Judgment, Exhibit A, ¶10 (Index No. 85); Robertson Affidavit, ¶11 (Index No. 128-29).

[13]Robertson Affidavit, ¶9 (Index No. 128).

[14]Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Summary Judgment, Exhibit A, ¶¶12, 14 (Index No. 85-86); Plaintiffs' Motion for Summary Judgment, Exhibit 3 (Index No. 93-95); Robertson Affidavit, ¶12 (Index No. 129).

[15]Robertson Affidavit, ¶12 (Index No. 129).

14. Mr. Robertson relied on Mr. Dunn's representations that the Lauren Plaza was a suitable investment for him, and Mr. Robertson would not have invested in Lauren Plaza but for Mr. Dunn's recommendations. In fact, the Lauren Plaza was not a suitable investment for Mr. Robertson because, among other things, 1) he was not in the 50% tax bracket before or after the calendar year 1981, and 2) the partnership shares were not easily transferable, there being no market for the shares.[16]

15. Subsequent to Mr. Robertson's acquisition of shares in Lauren Plaza, Kidder, Peabody & Co., Incorporated, was acquired by plaintiff PaineWebber, which is the successor in interest to Kidder, Peabody.

16. On March 10, 1998, the Robertson Family Trust ("Robertson Family") submitted a Statement of Claim to the National Association of Securities Dealers, Inc. ("NASD"), seeking to arbitrate a claim the Robertson Family has against PaineWebber, Inc., KidderPeabody & Co., Inc., and one of KidderPeabody's brokers, Van Francis Dunn, Jr.[17] As noted above, in response to the Robertson Family's Arbitration Claim, the Brokers filed an action in the Third District Court for Salt Lake County, State of Utah, seeking an order temporarily and permanently staying the NASD arbitration on the grounds that the Robertson Family's claim was not arbitrable because it was barred by

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[16]Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Summary Judgment, Exhibit A, ¶13 (Index No. 86); Robertson Affidavit, ¶13 (Index No. 129).

[17]Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Summary Judgment, Exhibit A (Index No. 83-86)

§10304 of the NASD Code of Arbitration Procedure, and that the District Court, and not the NASD, should determine whether the Robertson Family's claim is arbitrable.[18]

Section 10304 of the NASD Code of Arbitration Procedure provides:

> No dispute, claim, or controversy shall be eligible for submission to arbitration under the Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim, or controversy. This Rule shall not extend applicable statutes of limitations, nor shall it apply to any case which is directed to arbitration by a court of competent jurisdiction.

17. The Robertson Family opposed the Brokers' request for a temporary stay, and filed a motion to dismiss the Brokers' Complaint on the grounds that the NASD, and not the District Court, should determine the meaning and application of §10304 of the NASD Code of Arbitration.[19] Apparently finding that the NASD was not the appropriate body to determine the meaning of its own rules of arbitration procedure, the District Court granted the Brokers' request for a temporary stay, and denied the Robertson Family's motion to dismiss.[20]

18. The Brokers then filed a motion for summary judgment on one ground: that

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[18]Plaintiffs' Complaint (Index No. 1-22); Plaintiffs' Motion for Order Temporarily Staying Arbitration Proceeding (Index No. 23-55).

[19]Robertson Opposition to Motion to Stay (Index No. 62-70); Robertson Motion Dismiss (Index No. 62-70)

[20]Order Temporarily Staying Arbitration Proceeding (Index No. 109; 160-63); Order Denying Motion to Dismiss (Index No. 167-69).

the Robertson Family's claim is barred because §10304 of the NASD Code of Arbitration Procedure provides that claims based upon events occurring more than six years prior to the filing of the Claim are not eligible for arbitration.[21] The District Court granted the Brokers' motion for summary judgment, and entered its Findings of Fact, Conclusions of Law, and Order on February 8, 1999.[22]

19. On or about March 9th, 1999, twenty-nine days after entry of the final order, Brian W. Steffensen, legal counsel for the Robertson Family, called Judge Fuch's clerk at the Third Judicial District Court of Salt Lake County and inquired if the District Court had entered its Final Order.[23] At that time, the clerk incorrectly informed the Robertson Family's attorney that the Court had issued its Final Order on February 10, 1999.[24] Based on the representation of the District Court's Clerk, counsel for the Robertson Family calculated that the Robertson Family had thirty days from February 10, 1999, in which to file a Notice of Appeal to appeal the District Court's rulings and orders in this action, therefore until March 12.[25]

20. Mr. Steffensen executed a Notice of Appeal and gave it to his secretary for

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[21]Plaintiffs Motion for Summary Judgment (Index No. 71-98).

[22]District Court's Findings of Fact, Conclusions of Law and Order (Index No. 177-81)

[23]Affidavit of Brian W. Steffensen, ¶ 2 (Index No. 209-11)

[24]Affidavit of Brian W. Steffensen, ¶ 2 (Index No. 209-11)

[25]Affidavit of Brian W. Steffensen, ¶ 3 (Index No. 209-11)

filing on Wednesday, March 10, 1999, instructing her to file it with the District Court that day together with the appropriate fee. However, counsel's secretary apparently did not cause the Notice of Appeal to be filed with the District Court until the next day, March 11, 1999, because she did not believe that the deadline for filing would run until Friday, March 12, 1999.[26]

21. The Utah Court of Appeals transferred the case to the Utah Supreme Court for decision, where the Plaintiffs filed a Motion for Summary Disposition on the Grounds that the Robertson Family had not filed their Notice of Appeal within 30 days as required by Utah R. App. Proc. 4(a).[27] The Supreme Court granted the Plaintiffs' Motion for Summary Disposition by its Order dated June 1, 1999.[28] In its Order, the Supreme Court stated that "Plaintiffs' motion for summary dismissal is granted. Defendant filed its appeal one day late, and this court lacks jurisdiction over the case. Defendant's remedy lies with the district court if it seeks an extension of time in which to renew its appeal."[29]

22. On June 23, 1999, Plaintiffs filed a motion requesting an extension of time to file a Notice of Appeal.[30] The Court denied said motion on the grounds that filing of

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[26]Affidavit of Brian W. Steffensen, ¶3 (Index No. 210)

[27]Plaintiffs' Motion for Summary Disposition.

[28]Order of the Supreme Court (Index No. 222).

[29]Order of the Supreme Court (Index No. 222).

[30]Robertson's Motion for Extension of Time to File Notice of Appeal (Index No. 197-213).

the Notice of Appeal one day late, although ostensibly caused by the Court Clerk's providing inaccurate information to counsel for plaintiff, was inexcusable neglect by the Robertson's counsel.[31]

23. Plaintiff subsequently filed a Rule 59 and 60 Motion for "Reconsideration."[32] This Motion was denied by the District Court on December 8, 1999.[33]

24. The present appeal was subsequently filed on January 6, 2000.

SUMMARY OF ARGUMENT

In the underlying action, the District Court made the determination that it had jurisdiction to rule on Plaintiff's Motion to Stay NASD Arbitration Proceedings, and granted said Motion. Further, the District Court entertained Plaintiffs' Motion for Summary Judgment. The primary thrust of Plaintiffs Motion for Summary Judgment was that, pursuant to the provisions of the NASD, the Robertson's claims were barred by the statute of limitations. The Court agreed with Plaintiffs and granted their Motion for Summary Judgment. In doing so the District Court usurped the authority of the NASD to interpret their own code provisions. Rather than allow the NASD, which drafted its code provisions and had expertise and experience in interpreting them, to determine if the

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[31]Order Denying Motion for Extension of Time to File Appeal (Index No. 235-37).

[32]Robertson's Motion to Reconsider (Index No. 238-244).

[33]Order Denying Motion to Reconsider (Index No. 264-66).

claims were barred by the statute of limitations, the District Court interjected its own interpretation of the provisions and held that the claims were barred.

The issue of whether a District Court may unilaterally bar a claimant from pursuing legitimate claims under the provisions of the NASD, by determining that the claims are barred by a statute of limitations contained within the NASD Code, is a matter of first impression in the State of Utah. It is a significant issue in that, if the District Court's decision is allowed to stand unchallenged, any NASD claimant may be subject to being dragged into litigation in the District Court under the premise that the Court, not the NASD, has the authority to interpret and rule on the NASD provisions. Such a holding is in direct contravention to the very reason for the NASD, namely to prevent costly litigation and provide claimants with a quick and inexpensive means of resolving disputes. Additionally, the holding will necessarily create, rather than minimize litigation which could and should be handled through the arbitration proceedings required by the NASD.

Counsel for the Robertsons, Brian W. Steffensen, believed that the District Court, in granting Plaintiffs' Motion for Summary Judgment, had made a ruling that was legally incorrect. As such, an appeal of the decision was necessary.

The District Court does not regularly notify counsel when its final orders are entered. As such, it is incumbent upon counsel to check with the Court periodically to determine if the final order has been entered, such that they are aware of when the 30 day

time period in which to file a Notice of Appeal has begun. In the present case, Mr. Steffensen contacted the clerk of the Court on what was in reality the 29th day after the final order of the Court, granting Plaintiffs' Motion for Summary Judgment, had been entered. However, he was informed by the Clerk of the Court that it was only the 27th day after entry of the final order. Mr. Steffensen had the Notice of Appeal filed within 48 hours of contacting the clerk of the Court. According to the information he had been provided, and which he relied upon, his Notice of Appeal was filed one day before the expiration of the 30 day period. However, as a result of the misinformation he was provided, the Notice was actually filed one day late.

As the Notice of Appeal was filed one day late, Plaintiffs moved to dismiss the Appeal as being untimely. Said Motion was granted and the Supreme Court instructed counsel for the Robertsons that to perfect the appeal he would need to seek leave from the District Court for an extension of time to file the Notice of Appeal. As such, Mr. Steffensen filed a Motion seeking an extension of time to file the Notice of Appeal. Said Motion was denied by the District Court on the sole grounds that the delay in filing the notice was not excusable neglect on the part of counsel for the Robertsons. Such a holding is untenable as a matter of law given the facts present in this case. To uphold such a ruling is to support the notion that no attorney can rely on information received from District Court personnel.

In essence, this is simply a question of what constitutes excusable neglect. If the

Court believes that it is not excusable neglect to rely on information provided by the clerk of the Court, which is later determined to be incorrect, in calendaring a filing deadline, then this appeal should be denied. However, if the Court believes an attorney is justified in relying on information provided by Court's clerk, and if a human mistake is made that in the interests of justice it should be rectified, then this appeal should be granted.

ARGUMENT

A. Judge Peuler's Holding That There Was Not Excusable Neglect Is Incorrect

The issue for this Court to consider is a narrow one: What constitutes excusable neglect? The question can actually be further refined in this case: Does an attorney's reliance upon information provided to him/her by the District Court, which is later discovered to be incorrect, constitute excusable neglect when the attorney relies on the incorrect information to his/her detriment, and as a result misses the filing deadline for filing a Notice of Appeal by one day? It is this Appellant's contention that the answer to the later question must clearly be yes.

Excusable neglect, in the context of an attorney failing to file documents within specified or statutorily defined time periods has been addressed by the U.S. Supreme Court, the Federal Courts, and the Utah Supreme Court. The Utah Supreme Court in the case of West v. Grand County, 942 P.2d 337 (Utah 1997), stated the following:

> "Both the United States Supreme Court and the United States Court of Appeals for the Tenth Circuit have articulated four factors relevant to a determination of excusable neglect:

> "[i] the danger of prejudice to [the non-moving party], [ii] the length of the delay and its potential impact on judicial proceedings, [iii] the reason for the delay, including whether it was within the reasonable control of the movant, and [iv] whether the movant acted in good faith." *Id.* at 340-41.

The District Court, Judge Peuler, utilized the foregoing factors and held that "although it appears that the late filing does not prejudice plaintiff, nor was the length of delay substantial, and further while there is no evidence that the movant acted in bad faith, it appears to the Court that the reason for delay was not beyond the control of the movant."[34] Given the District Court's ruling, the issue is further refined to wether, because the reason for the delay was not beyond the control of the movant, the delay cannot be considered excusable neglect. In this regard, the U.S. Supreme Court decision in Pioneer Investment Services v. Brunswick Assoc. Ltd., 570 U.S. 380, is helpful and provides a detailed opinion fully analyzing the terminology "excusable neglect."

In the case of Pioneer Investment Services the Supreme Court specifically held that the term "excusable neglect" is not strictly limited to "cases where the failure to act [is] due to circumstances beyond the movants control." *Id.* at 386. Stated differently, and in the context of this action, excusable neglect may be present in a case where the "reason for delay was not beyond the control of the movant."[35] The District Court simply misapplied the standard when it held that because the reason for the delay was not beyond the control of the movant that there could not be excusable neglect. As noted above, the

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[34]Minute Entry dated August 30, 1999 (Index 232).

[35]Minute Entry dated August 30, 1999 (Index 232).

U.S. Supreme Court has specifically held that such a conclusion is wrong. Neglect may take many forms. In Pioneer Investment Services the Supreme Court explained as follows:

> The ordinary meaning of "neglect" is "to give little attention or respect" to a matter, or, closer to the point for our purposes, "to leave undone or unattended to especially through carelessness" [citations omitted]. The word therefore encompasses both simple, faultless omissions to act and, more commonly, omissions caused by carelessness. Courts properly assume, absent sufficient indication to the contrary, that Congress intends the words in its enactments to carry "their ordinary, contemporary, common meaning." [Citation omitted.] Hence, by empowering the courts to accept late filings "where the failure to act was the result of excusable neglect," Rule 9006(b)(1), Congress plainly contemplated that the courts would be permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control."

Id. at 388. The Supreme Court also addressed the issue of what the term "excusable" means and when the neglect of counsel will be considered "excusable." The Supreme Court held as follows: "Because Congress has provided no other guideposts for determining what sorts of neglect will be considered "excusable," we conclude that the determination is, at bottom, an equitable one, taking account of all relevant circumstances surrounding the party's omission." *Id.* at 395. In the Pioneer Investment Services case, the attorney for respondents had failed to timely file necessary proofs of claim with the Bankruptcy Court. The notice of the date for filing had been forwarded to counsel for respondents attorney, but in an unusual an inconspicuous notice regarding a creditors meeting. In determining that the failure to timely file the proofs of claims was indeed

excusable neglect, the Supreme Court stated the following:

> "This is not to say, of course, that respondents' counsel was not remiss in failing to apprehend the notice. To be sure, were there any evidence of prejudice to petitioner or to judicial administration in this case, or any indication at all of bad faith, we could not say that the Bankruptcy Court abused its discretion in declining to find the neglect to be "excusable." In the absence of such a showing, however, we conclude that the unusual form of notice employed in this case requires a finding that the neglect of respondents' counsel was, under all circumstances, "excusable."

Id. at 398-99. In the present case, no one contests the fact that counsel for the Robertsons contacted the clerk of the court within the 30 day period after the entry of the final order granting the Motion for Summary Judgment. Although it was the 29th day, there was still ample time for counsel for the Robertsons to file a Notice of Appeal the following day, such that it would have been timely. However, as a direct result of being informed by the Clerk of the Court that the final order was not entered until 2 days post its actual filing date, thereby making counsel believe only 27 days had passed since entry of the final order, counsel was lulled into a sense of security that he still had 3 days time to file the notice of appeal. This is not even a case like Pioneer Investments where the attorney failed to locate the date which had been provided. Rather, this is a case where counsel actually contacted the Court to obtain information, and was provided with an inaccurate date. As such, if the Supreme Court found that failing to locate an inconspicuous deadline was excusable neglect as a matter of law, it follows that abiding by a deadline provided by the Court, even though wrong, which counsel for the Robertsons did do in filing prior to the 30 days as calculated from the date provided by the Clerk of the Court,

must constitute excusable neglect as a matter of law.

Judge Peuler's ruling that the one day delay in filing was not excusable neglect is factually and legally incorrect.

B. The Unique Circumstances Doctrine Applies And Mandates A Reversal Of Judge Peuler's Ruling

Alternatively, the facts presented in the case at hand allow it to fit squarely within the "unique circumstances" doctrine. In the matter of Pinion v. Dow Chemical, U.S.A., 928 F.2d 1522 (11th Cir. 1991), the Court succinctly set forth the "unique circumstances" doctrine as follows:

> Courts will permit an appellant to maintain an otherwise untimely appeal in unique circumstances in which the appellant reasonably and in good faith relied upon judicial action that indicated to the appellant that his assertion of his right to appeal would be timely, so longs as the judicial action occurred prior to the expiration of the official time period such that the appellant could have given timely notice had he not been lulled into inactivity.

Id. at 1528 [16].[36] In the present case, all of the elements of the unique circumstances doctrine have been met. The final order regarding the Plaintiffs' Motion for Summary Judgment was entered on February 8, 1999. Counsel for the Robertsons contacted the Court on March 9, 1999, the 29th day after entry of the Order. As such, he contacted the

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[36]The 10th Circuit has likewise acknowledged the "unique circumstances" doctrine. In Senjuro v Murray, 943 F.2d 36 (10th Cir. 1991) the Court held: "In carefully limited circumstances, relief from an untimely notice of appeal may be available. If the district court induced detrimental reliance by an appellant resulting in the filing of an untimely notice of appeal, we may allow the appeal in the "best interests of justice" given such unique circumstances." *Id.* at 38.

Court prior to whenthe official time period had run for filing of the Notice of Appeal. Thereafter, counsel for the Robertsons reasonable, and in good faith relied upon the information provided by the Court that the final order was not entered until February 10, 1999, thereby giving him until March 12 to file the Notice of Appeal. (The Notice was actually served on March 11, 1999.) As such, the unique circumstance doctrine should be applied to permit the Robertsons to file their Notice of Appeal.

C. Judge Peuler's Denial Of The Rule 59/60 Motion Was An Abuse Of Discretion

Rule 59, Utah Rules of Civil Procedure, provides that:

> "a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment:
>
> . . . .
>
> (6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.
>
> (7) Error in Law.

The Robertsons clearly set forth in their Rule 59 Motion the facts and the law which would justify the legal conclusion that the filing of the Notice of Appeal, one day late, was excusable neglect. The Court held that because the "delay was not beyond the control of the movant" that the delay in filing was not "excusable neglect.[37] However, as outlined above, this is an erroneous standard. Stated differently, there was no legal or

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[37]Minute entry dated August 30, 1999 (Index No. 232-33).

factual basis for Judge Peuler's denial of the Rule 59/60 Motion.

Given that the only reason Judge Peuler provided for denying the Rule 59/60 Motion, was that the delay was not beyond the control of the movant, and such a standard is incorrect, the denial of the Rule 59/60 Motion was an abuse of discretion.

CONCLUSION

Judge Peuler ruled that because the reason for the delay in filing the Notice of Appeal was not beyond the control of movant, there was not "excusable neglect. In making this ruling, Judge Peuler applied an incorrect standard as to what constitutes "excusable neglect." Mr. Steffensen's reliance on information received directly from the Court clearly constitutes excusable neglect. Further, his detrimental reliance on information received from the District Court as to the date he needed to file the Notice of Appeal puts this case squarely within the "unique circumstances" doctrine. Further, Judge Peuler's refusal to modify her ruling pursuant to the Robertson's Rule 59/60 Motion constituted an abuse of discretion when the great weight of factual and legal evidence demonstrated that counsel's conduct did indeed constitute excusable neglect. Therefore, this Court should reverse such findings and remand this case to the District Court with instructions to permit the Robertson's leave for an extension of time to renew their Appeal.

DATED this 3rd day of May, 2000

Brian W. Steffensen
Mark A. Riekhof
Counsel for Appellant

CERTIFICATE OF MAILING

I hereby certify that on the 3rd day of May, 2000, that I caused a true and correct copy of the foregoing instrument to be X mailed, postage prepaid; and /or _____hand delivered by_____fax and/or by_____courier; to:

Bryon J. Benevento
Robert W. Payne
SNELL & WILMER
15 West South Temple, Suite 1200
Gateway Tower West
Salt Lake City, UT 84101
FAX 257-1800

Rebecca Rebman

ADDENDUM

(3) 30 district judges in the Third District;
(4) 12 district judges in the Fourth District;
(5) four district judges in the Fifth District;
(6) two district judges in the Sixth District;
(7) three district judges in the Seventh District; and
(8) two district judges in the Eighth District. 1998

8-1-2.3. Number of juvenile judges and jurisdictions. The number of juvenile court judges shall be:
(1) two juvenile judges in the First Juvenile District;
(2) five juvenile judges in the Second Juvenile District;
(3) eight juvenile judges in the Third Juvenile District;
(4) four juvenile judges in the Fourth Juvenile District;
(5) two juvenile judges in the Fifth Juvenile District;
(6) one juvenile judge in the Sixth Juvenile District;
(7) two juvenile judges in the Seventh Juvenile District; and
(8) one juvenile judge in the Eighth Juvenile District. 1999

78-1-2.4, 78-1-3. Repealed. 1996

CHAPTER 2

SUPREME COURT

Section
78-2-1. Number of justices — Terms — Chief justice and associate chief justice — Selection and functions.
78-2-1.5, 78-2-1.6. Repealed.
78-2-2. Supreme Court jurisdiction.
78-2-3. Repealed.
78-2-4. Supreme Court — Rulemaking, judges pro tempore, and practice of law.
78-2-5. Repealed.
78-2-6. Appellate court administrator.
78-2-7. Repealed.
78-2-7.5. Service of sheriff to court.
78-2-8 to 78-2-14. Repealed.

78-2-1. Number of justices — Terms — Chief justice and associate chief justice — Selection and functions.

(1) The Supreme Court consists of five justices.

(2) A justice of the Supreme Court shall be appointed initially to serve until the first general election held more than three years after the effective date of the appointment. Thereafter, the term of office of a justice of the Supreme Court is ten years and commences on the first Monday in January following the date of election. A justice whose term expires may serve upon request of the Judicial Council until a successor is appointed and qualified.

(3) The justices of the Supreme Court shall elect a chief justice from among the members of the court by a majority vote of all justices. The term of the office of chief justice is four years. The chief justice may serve successive terms. The chief justice may resign from the office of chief justice without resigning from the Supreme Court. The chief justice may be removed from the office of chief justice by a majority vote of all justices of the Supreme Court.

(4) If the justices are unable to elect a chief justice within 30 days of a vacancy in that office, the associate chief justice shall act as chief justice until a chief justice is elected under this section. If the associate chief justice is unable or unwilling to act as chief justice, the most senior justice shall act as chief justice until a chief justice is elected under this section.

(5) In addition to the chief justice's duties as a member of the Supreme Court, the chief justice has duties as provided by

(6) There is created the office of associate chief justice. The term of office of the associate chief justice is two years. The associate chief justice may serve in that office no more than two successive terms. The associate chief justice shall be elected by a majority vote of the members of the Supreme Court and shall be allocated duties as the chief justice determines. If the chief justice is absent or otherwise unable to serve, the associate chief justice shall serve as chief justice. The chief justice may delegate responsibilities to the associate chief justice as consistent with law. 1990

78-2-1.5, 78-2-1.6. Repealed. 1971, 1981

78-2-2. Supreme Court jurisdiction.

(1) The Supreme Court has original jurisdiction to answer questions of state law certified by a court of the United States.

(2) The Supreme Court has original jurisdiction to issue all extraordinary writs and authority to issue all writs and process necessary to carry into effect its orders, judgments, and decrees or in aid of its jurisdiction.

(3) The Supreme Court has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:
(a) a judgment of the Court of Appeals;
(b) cases certified to the Supreme Court by the Court of Appeals prior to final judgment by the Court of Appeals;
(c) discipline of lawyers;
(d) final orders of the Judicial Conduct Commission;
(e) final orders and decrees in formal adjudicative proceedings originating with:
(i) the Public Service Commission;
(ii) the State Tax Commission;
(iii) the School and Institutional Trust Lands Board of Trustees;
(iv) the Board of Oil, Gas, and Mining;
(v) the state engineer; or
(vi) the executive director of the Department of Natural Resources reviewing actions of the Division of Forestry, Fire and State Lands;
(f) final orders and decrees of the district court review of informal adjudicative proceedings of agencies under Subsection (e);
(g) a final judgment or decree of any court of record holding a statute of the United States or this state unconstitutional on its face under the Constitution of the United States or the Utah Constitution;
(h) interlocutory appeals from any court of record involving a charge of a first degree or capital felony;
(i) appeals from the district court involving a conviction of a first degree or capital felony;
(j) orders, judgments, and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction; and
(k) appeals from the district court of orders, judgments, or decrees ruling on legislative subpoenas.

(4) The Supreme Court may transfer to the Court of Appeals any of the matters over which the Supreme Court has original appellate jurisdiction, except:
(a) capital felony convictions or an appeal of an interlocutory order of a court of record involving a charge of a capital felony;
(b) election and voting contests;
(c) reapportionment of election districts;
(d) retention or removal of public officers;
(e) matters involving legislative subpoenas; and
(f) those matters described in Subsections (3)(a) through (d).

(5) The Supreme Court has sole discretion in granting or denying a petition for writ of certiorari for the review of a Court of Appeals adjudication, but the Supreme Court shall

review those cases certified to it by the Court of Appeals under Subsection (3)(b).

(6) The Supreme Court shall comply with the requirements of Title 63, Chapter 46b, in its review of agency adjudicative proceedings. 1996

78-2-3. Repealed. 1986

78-2-4. Supreme Court — Rulemaking, judges pro tempore, and practice of law.

(1) The Supreme Court shall adopt rules of procedure and evidence for use in the courts of the state and shall by rule manage the appellate process. The Legislature may amend the rules of procedure and evidence adopted by the Supreme Court upon a vote of two-thirds of all members of both houses of the Legislature.

(2) Except as otherwise provided by the Utah Constitution, the Supreme Court by rule may authorize retired justices and judges and judges pro tempore to perform any judicial duties. Judges pro tempore shall be citizens of the United States, Utah residents, and admitted to practice law in Utah.

(3) The Supreme Court shall by rule govern the practice of law, including admission to practice law and the conduct and discipline of persons admitted to the practice of law. 1986

78-2-5. Repealed. 1988

78-2-6. Appellate court administrator.

The appellate court administrator shall appoint clerks and support staff as necessary for the operation of the Supreme Court and the Court of Appeals. The duties of the clerks and support staff shall be established by the appellate court administrator, and powers established by rule of the Supreme Court. 1986

78-2-7. Repealed. 1986

78-2-7.5. Service of sheriff to court.

The court may at any time require the attendance and services of any sheriff in the state. 1988

78-2-8 to 78-2-14. Repealed. 1986, 1988

CHAPTER 2a

COURT OF APPEALS

Section

78-2a-1. Creation — Seal.

There is created a court known as the Court of Appeals. The Court of Appeals is a court of record and shall have a seal. 1986

78-2a-2. Number of judges — Terms — Functions — Filing fees.

(1) The Court of Appeals consists of seven judges. The term of appointment to office as a judge of the Court of Appeals is until the first general election held more than three years after the effective date of the appointment. Thereafter, the term of office of a judge of the Court of Appeals is six years and commences on the first Monday in January, next following the date of election. A judge whose term expires may serve, upon request of the Judicial Council, until a successor is elected and qualified. The presiding judge of the Court of Appeals shall receive as additional compensation $1,000 per annum or fraction thereof for the period served.

(2) The Court of Appeals shall sit and render judgment in panels of three judges. Assignment to panels shall be by random rotation of all judges of the Court of Appeals. The Court of Appeals by rule shall provide for the selection of a chair for each panel. The Court of Appeals may not sit en banc.

(3) The judges of the Court of Appeals shall elect a presiding judge from among the members of the court by majority vote of all judges. The term of office of the presiding judge is two years and until a successor is elected. A presiding judge of the Court of Appeals may serve in that office no more than two successive terms. The Court of Appeals may by rule provide for an acting presiding judge to serve in the absence or incapacity of the presiding judge.

(4) The presiding judge may be removed from the office of presiding judge by majority vote of all judges of the Court of Appeals. In addition to the duties of a judge of the Court of Appeals, the presiding judge shall:

(a) administer the rotation and scheduling of panels;

(b) act as liaison with the Supreme Court;

(c) call and preside over the meetings of the Court of Appeals; and

(d) carry out duties prescribed by the Supreme Court and the Judicial Council.

(5) Filing fees for the Court of Appeals are the same as for the Supreme Court. 1988

78-2a-3. Court of Appeals jurisdiction.

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary:

(a) to carry into effect its judgments, orders, and decrees; or

(b) in aid of its jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, School and Institutional Trust Lands Board of Trustees, Division of Forestry, Fire and State Lands actions reviewed by the executive director of the Department of Natural Resources, Board of Oil, Gas, and Mining, and the state engineer;

(b) appeals from the district court review of:

(i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies; and

(ii) a challenge to agency action under Section 63-46a-12.1;

(c) appeals from the juvenile courts;

(d) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony;

(e) appeals from a court of record in criminal cases, except those involving a conviction of a first degree or capital felony;

(f) appeals from orders on petitions for extraordinary writs sought by persons who are incarcerated or serving any other criminal sentence, except petitions constituting a challenge to a conviction of or the sentence for a first degree or capital felony;

(g) appeals from the orders on petitions for extraordinary writs challenging the decisions of the Board of Pardons and Parole except in cases involving a first degree or capital felony;

(h) appeals from district court involving

Section
6. [Number of judges of district court and other courts — Divisions.]
7 [Qualifications of justices and judges]
8 [Vacancies — Nominating commissions — Senate approval.]
9 [Judicial retention elections.]
10. [Restrictions on justices and judges]
11. [Judges of courts not of record]
12 [Judicial Council — Chief justice as administrative officer — Legal counsel.]
13. [Judicial Conduct Commission.]
14. [Compensation of justices and judges]
15. [Mandatory retirement.]
16. [Public prosecutors.]
17 to 28 [Repealed.]

Section 1. [Judicial powers — Courts.]

The judicial power of the state shall be vested in a supreme court, in a trial court of general jurisdiction known as the district court, and in such other courts as the Legislature by statute may establish The Supreme Court, the district court, and such other courts designated by statute shall be courts of record. Courts not of record shall also be established by statute *1984 (2nd S.S.)*

Sec. 2. [Supreme court — Chief justice — Declaring law unconstitutional — Justice unable to participate.]

The Supreme Court shall be the highest court and shall consist of at least five justices The number of justices may be changed by statute but no change shall have the effect of removing a justice from office A chief justice shall be selected from among the justices of the Supreme Court as provided by statute The chief justice may resign as chief justice without resigning from the Supreme Court The Supreme Court by rule may sit and render final judgment either en banc or in divisions The court shall not declare any law unconstitutional under this constitution or the Constitution of the United States, except on the concurrence of a majority of all justices of the Supreme Court If a justice of the Supreme Court is disqualified or otherwise unable to participate in a cause before the court, the chief justice, or in the event the chief justice is disqualified or unable to participate, the remaining justices, shall call an active judge from an appellate court or the district court to participate in the cause 1984 (2nd S.S.)

Sec. 3. [Jurisdiction of Supreme Court.]

The Supreme Court shall have original jurisdiction to issue all extraordinary writs and to answer questions of state law certified by a court of the United States The Supreme Court shall have appellate jurisdiction over all other matters to be exercised as provided by statute, and power to issue all writs and orders necessary for the exercise of the Supreme Court's jurisdiction or the complete determination of any cause 1984 (2nd S.S.)

Sec. 4. [Rule-making power of Supreme Court — Judges pro tempore — Regulation of practice of law.]

The Supreme Court shall adopt rules of procedure and evidence to be used in the courts of the state and shall by rule manage the appellate process The Legislature may amend the Rules of Procedure and Evidence adopted by the Supreme Court upon a vote of two-thirds of all members of both houses of the Legislature Except as otherwise provided by this constitution, the Supreme Court by rule may authorize retired justices and judges and judges pro tempore to perform any judicial duties Judges pro tempore shall be citizens of the United States, Utah residents, and admitted to practice law in Utah. The Supreme Court by rule shall govern the practice of law, including admission to practice law and the conduct and discipline of persons admitted to practice law 1984 (2nd S.S.)

Sec. 5. [Jurisdiction of district court and other courts — Right of appeal.]

The district court shall have original jurisdiction in all matters except as limited by this constitution or by statute, and power to issue all extraordinary writs The district court shall have appellate jurisdiction as provided by statute The jurisdiction of all other courts, both original and appellate, shall be provided by statute Except for matters filed originally with the Supreme Court, there shall be in all cases an appeal of right from the court of original jurisdiction to a court with appellate jurisdiction over the cause 1984 (2nd S.S.)

Sec. 6. [Number of judges of district court and other courts — Divisions.]

The number of judges of the district court and of other courts of record established by the Legislature shall be provided by statute No change in the number of judges shall have the effect of removing a judge from office during a judge's term of office Geographic divisions for all courts of record except the Supreme Court may be provided by statute No change in divisions shall have the effect of removing a judge from office during a judge's term of office 1984 (2nd S.S.)

Sec. 7. [Qualifications of justices and judges.]

Supreme Court justices shall be at least 30 years old, United States citizens, Utah residents for five years preceding selection, and admitted to practice law in Utah Judges of other courts of record shall be at least 25 years old, United States citizens Utah residents for three years preceding selection, and admitted to practice law in Utah If geographic divisions are provided for any court, judges of that court shall reside in the geographic division for which they are selected 1984 (2nd S.S.)

Sec. 8. [Vacancies — Nominating commissions — Senate approval.]

(1) When a vacancy occurs in a court of record the governor shall fill the vacancy by appointment from a list of at least three nominees certified to the governor by the Judicial Nominating Commission having authority over the vacancy The governor shall fill the vacancy within 30 days after receiving the list of nominees If the governor fails to fill the vacancy within the time prescribed, the chief justice of the Supreme Court shall within 20 days make the appointment from the list of nominees

(2) The Legislature by statute shall provide for the nominating commissions' composition and procedures No member of the Legislature may serve as a member of, nor may the Legislature appoint members to, any Judicial Nominating Commission

(3) The Senate shall consider and render a decision on each judicial appointment within 60 days of the date of appointment. If necessary, the Senate shall convene itself in extraordinary session for the purpose of considering judicial appointments The appointment shall be effective upon approval of a majority of all members of the Senate If the Senate fails to approve the appointment, the office shall be considered vacant and a new nominating process shall commence

(4) Selection of judges shall be based solely upon consideration of fitness for office without regard to any partisan political consideration 1992

Sec. 9. [Judicial retention elections.]

Each appointee to a court of record shall be subject to an unopposed retention election at the first general election held more than three years after appointment Following initial voter approval, each Supreme Court justice every tenth year,

FILE

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Salt Lake City, Utah 84106
Telephone: (801) 485-3707

BEFORE THE NATIONAL ASSOCIATION OF SECURITIES DEALERS
ARBITRATION DEPARTMENT

JAMES L. ROBERTSON,
and The Robertson Family Trust

Plaintiff,

vs.

VAN F. DUNN, an Individual;
and PAINEWEBBER (fka KIDDER,
PEABODY & COMPANY, INC.)

Defendants.

STATEMENT OF CLAIM

James L. Robertson, by and through his attorney, submits the following Statement of Claim:

FACTUAL ALLEGATIONS

1. During 1981, James L. Robertson sold some shares of stock that resulted in a profit that was unusually large for him. Mr. Robertson's broker in selling the stock was an acquaintance of his, Van F. Dunn, who was an account executive at Kidder, Peabody & Co., Incorporated. ("Kidder, Peabody"). Mr. Dunn is a resident of Utah who resides at 4463 South Covecrest Dr., Holladay, UT 84124.

2. Because of his unusually large gain from the sale of stock, in the Spring of 1981 Mr. Robertson met with Mr. Dunn to discuss whether a tax shelter investment would be suitable for him. During this meeting Mr. Robertson told Mr. Dunn that because of the recent sale of stock, and that because he

would be selling more stock in the near future. his income during 1981 would be unusually high. Mr. Robertson asked Mr. Dunn if he knew of a good tax shelter investment that would not only shelter his income in 1981, but that would turn a profit in a fairly short time period. or around five years. Mr. Robertson also told Mr. Dunn that he needed the safest possible investment. Moreover. Mr. Robertson told Mr. Dunn that he had not been in a 50% tax bracket before 1981. and that he didn't expect to be in the 50% tax bracket in the future.

3. In response to Mr. Robertson's inquiry about the safest possible investment, Mr. Dunn recommended an investment in Lauren Plaza Associates. Ltd ("Lauren Plaza"), an Illinois Limited partnership that was financing a shopping center in Louisiana. Mr. Dunn indicated that because Lauren Plaza contemplated selling its investment in the shopping center within approximately five years, that an investment in the partnership would: 1) shelter income in the short term, and 2) result in a profit within a fairly short time.

4. Because he did not feel comfortable simply relying on his own judgment before making this investment, Mr. Robertson had his accountant. E. Dickson Adams, meet with Mr. Dunn to discuss the investment. Mr. Dunn convinced Mr. Adams that the Lauren Plaza was not only suitable for Mr. Robertson, but also that Mr. Robertson should purchase two units in the Lauren Plaza, rather than just one, for a total price of $158,000.00.

5. Therefore, because of Mr. Dunn's recommendation, and in reliance upon Mr. Dunn's recommendation, Mr. Robertson purchased two shares in the Lauren Plaza, for a total price of $158,000.00. See "Subscription Agreement", a copy of which is attached hereto as Exhibit "1".

6. Subsequent to making his investment in the Lauren Plaza, Mr. Robertson transfered his ownership of the Lauren Plaza shares to the Robertson Family Trust. Mr. Robertson has authority to

bring this claim on behalf of the trust. See Trust Agreement, attached hereto as Exhibit "2".

7. In 1984, Mr. Robertson contacted the general partner in the Lauren Plaza, Balcor Management Services, Inc., and asked about the appreciated value of the partnership based on the 98% occupancy level supposedly being maintained in the shopping center. Balcor did not opine as to the value of the partnership or its shares because there was no plan to sell the shopping center; therefore no appraisal was available. This concerned Mr. Robertson because he had understood, based on Mr. Dunn's representations, that the shopping center would be sold within five years of 1981, resulting in a substantial profit to investors in Lauren Plaza.

8. In 1986, Mr. Robertson was informed by Balcor Management Services, Inc., that although the occupancy level in the shopping center was 97%, problems had developed, and there were no plans to sell the property at that time.

9. In every annual report after 1986, Blacor reported problems but continued to express optimism. In fact, in 1989, Balcor reported rents were being collected on 95% of the property. In the November 1990 report, Balcor states, "...net cash flow is ahead of our projection for the year."

10. In the 1991 annual report, Balcor states, "Our original intention was to hold the property for five to ten years from acquisition in 1981, or until such time as a sale or refinancing would meet the partnerships objectives. We are now in the twelfth year of the holding period, and we anticipate holding the property an additional two to three years, assuming a loan modification is negotiated."

11. In a letter to the shareholders dated October 1991, Balcor said, "Operating cash flow from Lauren Plaza improved during the first nine months of the year and exceeded our budget projections. We now expect 1991 cash flow to be a significant improvement over 1990."

12. However, in a letter to shareholders dated October 1992, Balcor wrote, "A foreclosure sale has

been scheduled for October 21, 1992, at which point we expect the partnership to relinquish title to this property." See Exhibit "3" attached hereto.

13. Mr. Robertson relied on Mr Dunn's representations that the Lauren Plaza was a suitable investment for him, and Mr. Robertson would not have invested in Lauren Plaza but for Mr. Dunn's recommendations. In fact, the Lauren Plaza was not a suitable investment for Mr. Robertson because, among other things 1) he was not in the 50% tax bracket before or after the calendar year 1981, and 2) the partnership shares were not easily transferable, there being no market for the shares.

14. Because of the foreclosure on the Lauren Plaza property, Mr. Robertson lost $154,050.00 ($158,000.00 invested less $3,950 cash distributions).

15. Subsequent to Mr. Robertson's acquisition of shares in Lauren Plaza, Kidder, Peabody & Co., Incorporated, was acquired by respondent PaineWeber, which is the succesor in interest to Kidder, Peabody. PaineWeber is located at 170 S. Main St., Salt Lake City, UT (telephone 1-800-521-5840).

REQUEST FOR RELIEF

1. Mr. Robertson is entitled to a judgment in his favor of $154,050.00 plus attorneys fees, costs, and punitive damages in an amount determined by the Arbitration Panel to be fair and just under the circumstances.

DATED this 13th day of March, 1998.

BRIAN W. STEFFENSEN, P.C.

By: Brian W. Steffensen

VERIFICATION

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

I James L. Robertson, being first duly sworn, depose and say that I have reviewed the foregoing Statement of Claim, and state that the allegations contained therein are true and accurate.

DATED this 16th day of March, 2005

James L. Robertson

NOTARY PUBLIC

Residing at: _____

My Commission Expires:

_____

_____

NOTARY PUBLIC
Salt Lake County
June 11, 2007
STATE OF UTAH

THIRD DISTRICT COURT - SLC COURT
SALT LAKE COUNTY, STATE OF UTAH

PAINEWEBBER INC Et al, Plaintiff,	:	MINUTES MOTION FOR STAY
vs.	:	Case No: 980910104 MI
ROBERTSON FAMILY TRUST, Defendant.	:	Judge: DENNIS M FUCHS Date: November 17, 1998

Clerk: wendypg

PRESENT

Plaintiff's Attorney(s): ROBERT PAYNE
Defendant's Attorney(s): BRIAN STEFFENSEN
Video
Tape Number: 11/17/98 Tape Count: 10:00

HEARING

The above entitled case comes before the court for Oral Arguments on Plaintiff's Motion for Stay. Based upon respective counsel's argument, court grants a Temporary Stay. Robert Payne is to prepare the Order.

Robert W. Payne (5334)
SNELL & WILMER L.L.P.
111 East Broadway, Suite 900
Salt Lake City, UT 84111
Telephone: (801)237-1900
Facsimile: (801)237-1950

Attorneys for Plaintiffs

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

PAINEWEBBER, INC., a Delaware corporation, KIDDER PEABODY & CO., INC., a Delaware corporation, and VAN FRANCIS DUNN, JR., an individual, Plaintiffs, vs. The ROBERTSON FAMILY TRUST, by and through JAMES L. ROBERTSON, Trustee, Defendant.	**ORDER TEMPORARILY STAYING ARBITRATION PROCEEDING** Case No. 980910104 Honorable Dennis M. Fuchs

Plaintiffs' Motion for Order Temporarily Staying Arbitration Proceeding came on regularly before the Honorable Dennis M. Fuchs, on November 17, 1998, at 9:00 a.m. Robert W. Payne, of the law firm of Snell & Wilmer, appeared on behalf of the plaintiffs. Brian W. Steffensen, of the law firm of Steffensen, McDonald & Steffensen, appeared on behalf of the defendant. The Court having reviewed the memoranda submitted by the parties, having heard oral argument in support of and in opposition to the motion, the Court having announced from the Bench its decision regarding the motion, and good cause appearing therefor,

THE COURT FINDS as follows:

1. Defendant failed to carry its burden to demonstrate the existence of an arbitration agreement between these parties.

2. Jurisdictions are divided over the issue of who, as between courts and arbitrators, are the appropriate persons to determine whether an action is time-barred under § 10304 of the NASD Code.

3. In Cogswell v. Merrill Lynch, Pierce, Fenner & Smith Inc., 78 F.3d 474 (10th Cir. 1996), the Tenth Circuit Court of Appeals held that courts should determine the applicability of § 10304 of the NASD Code.

4. In light of the delay of over sixteen years between defendant's investment and the filing of its arbitration claims, defendant is unlikely to suffer any harm from a temporary stay of the arbitration proceeding pending this Court's determination of plaintiff's Motion for Summary Judgment.

Therefore, THE COURT ORDERS as follows:

1. Based upon the apparent absence of an arbitration agreement between these parties, based upon the reasoning in Cogswell v. Merrill Lynch, Pierce, Fenner & Smith Inc., 78 F.3d 474 (10th Cir. 1996), and based upon the arguments set forth in plaintiffs' memoranda, plaintiffs' Motion for Order Temporarily Staying Arbitration Proceeding is hereby granted.

2. NASD Arbitration Case Number 98-00981 is hereby stayed pending the Court's determination of plaintiff's Motion for Summary Judgment, which motion was filed with the Court on November 12, 1998.

MADE AND ENTERED this 2 day of Dec, 1998.

BY THE COURT:

DENNIS M. FUCHS
Third Judicial District Court

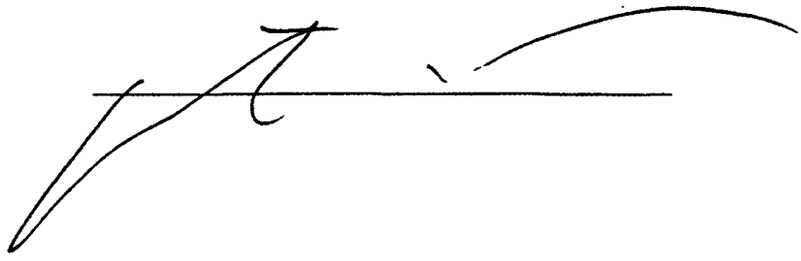
APPROVED AS TO FORM:

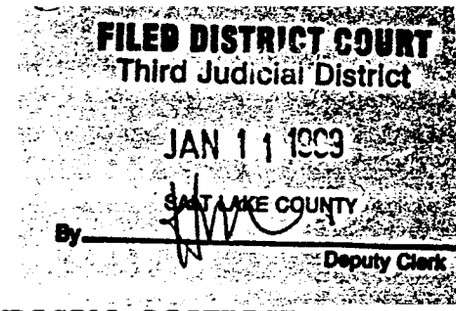
Brian W. Steffensen

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of November, 1998, I caused a true and correct copy of the foregoing **ORDER TEMPORARILY STAYING ARBITRATION PROCEEDING** to be served by regular mail, via United States Postal Service, postage prepaid, on the following:

Brian W. Steffensen
STEFFENSEN, McDONALD & STEFFENSEN
2159 South 700 East, Suite 100
Salt Lake City, Utah 84106





IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

PAINEWEBBER, INC., a Delaware corporation, KIDDER, PEABODY & CO. INC., a Delaware corporation; and VAN FRANCIS DUNN, JR., an individual,	:	MINUTE ENTRY
	:	CASE NO. 980910104
Plaintiffs,	:	
vs.	:	
THE ROBERTSON FAMILY TRUST, by and through JAMES L. ROBERTSON, Trustee,	:	
Defendant.	:	

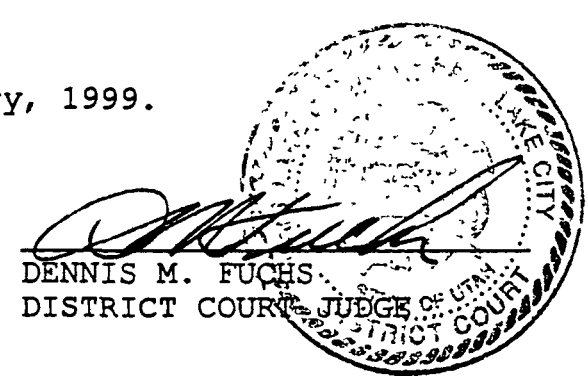
Defendant has had an opportunity to conduct discovery and an open invitation from plaintiff to request any documents they needed and defendant has failed to request documents. The Court therefore denies defendant's request to stay the determination of Summary Judgment pending further discovery.

There still being no written agreement for arbitration, the Court finds the Motion for Summary Judgment is ripe for decision and finds that the Court has jurisdiction over the issue of arbitration as per the argument of plaintiff and ruling of the Court granting the temporary stay of arbitration.

The Court finds that if the NASD is interpreted as a statute of repose, the six year limitation started running 1981. However, even if the Court should consider the NASD rule as a statute of limitations and as per the argument of defense that the discovery rule should apply, the Court would find that the Robertson Trust was put on notice long before 1992 that there were significant problems with the investment. Defendant should have been on notice from approximately 1984 forward. The Court finds that with any kind of diligent investigation on the part of defendant he would have discovered the problems.

For the foregoing reasons and the additional argument as contained in plaintiff's Memorandum, the Court finds that the action is time barred and hereby grants plaintiff's Motion. Plaintiff is to prepare the Order.

Dated this 11 Day of January, 1999.



DENNIS M. FUCHS
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry, postage prepaid, to the following, this 12 day of January, 1999:

Robert W. Payne
Attorney for Plaintiffs
111 E. Broadway, Suite 900
Salt Lake City, Utah 84111

Brian W. Steffensen
Attorney for Defendant
2159 South 700 East, Suite 100
Salt Lake City, Utah 84106

H Meeks

Robert W. Payne (5334)
SNELL & WILMER L.L.P.
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Telephone: (801)237-1900
Facsimile: (801)237-1950

Attorneys for Plaintiffs

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

PAINEWEBBER, INC., a Delaware corporation, KIDDER PEABODY & CO., INC., a Delaware corporation, and VAN FRANCIS DUNN, JR., an individual,

Plaintiffs,

vs.

The ROBERTSON FAMILY TRUST, by and through JAMES L. ROBERTSON, Trustee,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER AND JUDGMENT GRANTING SUMMARY JUDGMENT

Case No. 980910104

Honorable Dennis M. Fuchs

Plaintiffs' Motion for Motion for Summary Judgment and defendant's request for a Rule 56(f) continuance were fully briefed by the parties and submitted to the Court for decision.

The Court, having reviewed all of the motions, memoranda, affidavits and other evidence submitted by the parties, and good cause appearing therefore, finds, concludes and orders as follows:

FINDINGS OF FACT

Plaintiffs presented the following material facts in support of their motion for summary judgment. Defendants produced no evidence to dispute these facts:

1. In 1981, plaintiffs assisted James L. Robertson with the purchase of an interest in Lauren Plaza Associates, Ltd ("Lauren Plaza") which owned and operated a shopping center.

2. Plaintiffs and Mr. Robertson did not enter into a written agreement between them relating to the Lauren Plaza investment or relating to any other matter.

3. There was no further interaction between plaintiffs and defendant after 1981.

4. Defendant claims that James L. Robertson purchased the Lauren Plaza Investment based upon plaintiffs' erroneous investment advice and that the advice was erroneous 1) because James L. Robertson was not in a 50% tax bracket in or after 1981; 2) because the shares were not easily transferrable, there being no market for the shares; 3) because the shopping center was not sold within five years resulting in a quick profit; and 4) because Lauren Plaza was not the safest possible investment.

5. In 1984, Balcor, the general partner of Lauren Plaza, told Mr. Robertson that there were no plans to sell the shopping center. This information concerned Mr. Robertson because he had understood from the investment advise that the shopping center would be sold within five years of 1981, resulting in a substantial profit to investors in Lauren Plaza.

6. In 1986, Balcor told Mr. Robertson that there were no plans to sell the shopping center and that problems had developed.

7. In every Lauren Plaza annual report after 1986, Balcor reported problems.

8. In 1991, Balcor informed Mr. Robertson that the partnership planned to hold the shopping center for another two to three years if the partnership could negotiate a loan modification.

9. Defendant ignored plaintiffs' invitation to request any documentation that it believed would be helpful to oppose plaintiffs' motion for summary judgment. Defendant has not attempted to do any formal or informal discovery in this case.

CONCLUSIONS OF LAW

1. This Court has jurisdiction to consider the eligibility of defendant's claims for arbitration under Rule 10304 of the NASD Code of Arbitration Procedure. Cogswell v. Merrill Lynch, Pierce, Fenner & Smith Inc., 78 F.3d 474, 476 (10th Cir. 1996).

2. Defendant is not entitled to a Rule 56(f) continuance because it has neglected to do any formal or informal discovery to date, has failed to explain why it cannot present sufficient evidence to support its opposition, Callioux v. Progressive Ins. Co., 745 P.2d 838, 840 (Utah Ct. App. 1987), and has failed to "explain how the requested continuance will aid [its] opposition to summary judgment." Sandy City v. Salt Lake County, 794 P.2d 482, 488 (Utah Ct. App. 1990).

3. Rule 10304 of the NASD Code of Arbitration Procedure provides a substantive limit on claims that may be submitted to arbitration in the nature of a statute of repose. Cogswell v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 78 F.3d 474, 479 (10th Cir. 1996). Cf. Raithaus v. Saab-Scandia of America, Inc., 784 P.2d 1158, 1160 (Utah 1989). Thus, defendant's claims became ineligible for arbitration in 1987, six years from the date that James Robertson purchased his investment in Lauren Plaza.

4. Even if Rule 10304 is construed to be a statute of limitations, defendant's claims were barred no later than 1990. James Robertson discovered, or would have discovered through any kind of diligent investigation, that his investment had serious problems beginning in 1984. The limitations period began to run upon first learning of his legal injury in 1984, not upon learning of the full extent of his damages in 1992. Reiser v. Lohner, 641 P.2d 93, 99-100 (Utah 1982).

ORDER AND JUDGMENT

The Court, having carefully considered the arguments for and against the summary judgment and the request for a Rule 56(f) continuance, and the Court having announced its decisions regarding the motion and request in a minute entry dated January 11, 1999, and good cause appearing therefor,

IT IS HEREBY ORDERED AND ADJUDGED as follows:

1. Plaintiff's Motion for Summary Judgment is granted.

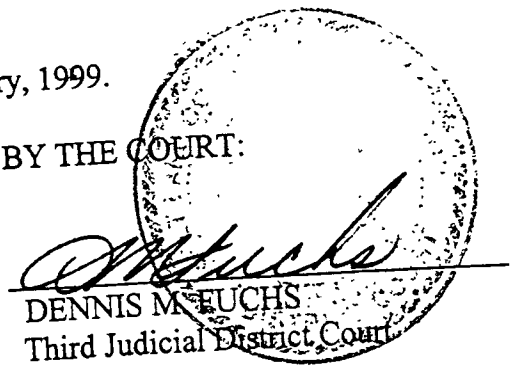
2. Defendants request for a Rule 56(f) continuance is denied.

3. NASD arbitration proceeding, Case No. 98-00981, is permanently stayed.

4. Defendant is permanently enjoined from seeking to arbitrate any claims against plaintiffs that are based upon events and occurrences that took place more than six years prior to the date of this order.

MADE AND ENTERED this 8 day of February, 1999.

BY THE COURT:



DENNIS M. FUCHS
Third Judicial District Court

IN THE SUPREME COURT OF THE STATE OF UTAH

----oo0oo----

Painewebber, Inc., a Delaware corporation, Kidder Peabody & Co., a Delaware corporation, and Van Francis Dunn, Jr., an individual,
Plaintiffs and Appellees,

v.

The Robertson Family Trust, by and through James L. Robertson, trustee,
Defendant and Appellant.

No. 990261

ORDER

Plaintiffs' motion for summary dismissal is granted. Defendant filed its appeal one day late, and this court lacks jurisdiction over the case. Defendant's remedy lies with the district court if it seeks an extension of time in which to renew its appeal.

BY THE COURT:

Date: June 1, 1988

Richard C. Howe
Chief Justice

Brian W. Steffensen, P.C. (3092)
Steffensen ❖ McDonald ❖ Steffensen
2159 S. 700 E., Suite 100
Salt Lake City, UT 84106
Tel: (801) 485-3707
Fax: (801) 485-7140

Attorney for Defendant the Robertson Family Trust

IN THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH

PAINEWEBBER, INC., a Delaware Corporation, KIDDER PEABODY & CO., INC., a Delaware Corporation, and VAN FRANCIS DUNN, JR., an individual,

Plaintiffs,

vs.

The ROBERTSON FAMILY TRUST, by and through JAMES L. ROBERTSON, Trustee,

Defendant.

AFFIDAVIT OF BRIAN W STEFFENSEN IN SUPPORT OF DEFENDANTS' MOTION FOR AN EXTENSION OF TIME IN WHICH TO FILE NOTICE OF APPEAL

Civil No. 980910104

Judge Sandra Peuler (originally assigned to Judge Fuchs and reassigned to Judge Peuler)

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

Brian Steffensen, being first duly sworn and under oath, testifies as follows:

1. I am over the age of 21 years, I am of sound mind, and I give the testimony in this affidavit of my own free will. I am a member in good standing of the Utah State Bar Association, and

I am the attorney for defendant/appellant The Robertson Family Trust (the "Robertson Family")in the above-captioned case. I have personal knowledge of the facts contained in this affidavit.

2. On or about March 9, 1999, I called JUDGE FUCHS' clerk at the Third Judicial District Court of Salt Lake County and inquired if the District Court had entered its Findings of Fact, Conclusions of Law, Order And Judgment Granting Summary Judgment in the above-entitled action. I made this inquiry because I had not received an Order issued by the District Court even though the plaintiffs had filed their proposed form of Order with the Court. At that time, the clerk informed me that the Court had issued its Findings of Fact, Conclusions of Law, Order and Judgment Granting Summary Judgment on February 10, 1999 (the "Final Order"). Because the District Court did not send to me a copy of the Final Order, I had not previously been aware that the Court had issued the Final Order.

3. Therefore, based on the representation of the District Court's Clerk, I calculated that the Robertson Family had thirty days from February 10, 1999, in which to file a Notice of Appeal to appeal the District Court's rulings and orders in this action. Thus, it was my understanding that the Robertson Family had until March 12, 1999 in which to file its Notice of Appeal. Therefore, I executed a Notice of Appeal and gave it to my secretary for filing on Wednesday, March 10, 1999, instructing her to file it with the District Court that day and pay the appropriate filing fee. However, my secretary apparently did not file the Notice of Appeal with the District Court until the next day, March 11, 1999, because she did not believe that the deadline for filing would run until Friday, March 12, 1999.

4. I assumed that when my messenger filed the Notice of Appeal with the District Court, that

the appropriate filing fee was also paid. This is because I instructed my secretary to pay the fee, and because the office of the Clerk of the District Court accepted the Notice of Appeal and filed the same. In my experience, whenever we have presented a filing requiring a fee without a check, the filing has not been accepted. I usually have received a call right then and asked to send down a check. However, on March 18, 1999, Wendy Purnell, the front office clerk of the Judge Fuchs, telephoned me and told me that she could not docket the Robertson Family's Notice of Appeal because the requisite filing fee had not been filed. Therefore, I immediately filed an Amended Notice of Appeal on March 18, 1999, and filed it with the District Court along with the requisite filing fee.

DATED this 22nd day of June, 1999.

Brian W. Steffensen
Attorney for Defendant/Appellant
The Robertson Family Trust

SUBSCRIBED AND SWORN TO before me this 22 day of ~~May~~ June, 1999.

NOTARY PUBLIC

Residing at: _____

My Commission Expires:

_____

NOTARY PUBLIC
MELISA HANSEN
2159 So. 700 E., Ste. 100
Salt Lake City, Utah 84106
My Commission Expires

IN THE SUPREME COURT OF THE STATE OF UTAH

----oo0oo----

Painewebber, Inc., a Delaware corporation, Kidder Peabody & Co., a Delaware corporation, and Van Francis Dunn, Jr., an individual,
Plaintiffs and Appellees,

v.

The Robertson Family Trust, by and through James L. Robertson, trustee,
Defendant and Appellant.

No. 990261

ORDER

Plaintiffs' motion for summary dismissal is granted. Defendant filed its appeal one day late, and this court lacks jurisdiction over the case. Defendant's remedy lies with the district court if it seeks an extension of time in which to renew its appeal.

BY THE COURT:

Date: June 1, 1988

Richard C. Howe
Chief Justice

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

PAINEWEBBER, INC., a Delaware corporation, KIDDER, PEABODY & CO. INC., a Delaware corporation; and VAN FRANCIS DUNN, JR., an individual,	:	**MINUTE ENTRY**
	:	**CASE NO. 980910104**
Plaintiffs,	:	
vs.	:	
THE ROBERTSON FAMILY TRUST, by and through JAMES L. ROBERTSON, Trustee,	:	
Defendant.	:	

Before the Court is a Notice to Submit for Decision on defendant's Motion for Extension of Time in Which to File Notice of Appeal. The Court having reviewed the pleadings filed in this matter, now enters the following ruling.

The defendant's Motion for Extension of Time is denied. Defendant's failure to timely file its appeal is not excusable neglect. Although it appears that the late filing does not prejudice plaintiff, nor was the length of delay substantial, and further while there is no evidence that the movant acted in bad faith, it appears to the Court that the reason for delay was not beyond the control of the movant. As pointed out by plaintiff, defendant knew that the Court had granted Summary Judgment on or

about January 11, 1999. Further, the defendant knew on or about January 23 that plaintiff had submitted its proposed Order. Defendant's failure to check with the clerk for a period in excess of 30 days to see whether an Order had been entered was neglect, but is not excusable. Based upon that, the defendant's Motion is denied.

Counsel for plaintiff is directed to prepare an Order consistent with this ruling.

Dated this 30 day of August, 1999.

SANDRA N. PEULER
DISTRICT COURT JUDGE

Robert W. Payne (5334)
SNELL & WILMER L.L.P.
111 East Broadway, Suite 900
Salt Lake City, UT 84111
Telephone: (801)237-1900
Facsimile: (801)237-1950

Attorneys for Plaintiffs

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

PAINEWEBBER, INC., a Delaware corporation, KIDDER PEABODY & CO., INC., a Delaware corporation, and VAN FRANCIS DUNN, JR., an individual,

Plaintiffs,

vs.

The ROBERTSON FAMILY TRUST, by and through JAMES L. ROBERTSON, Trustee,

Defendant.

ORDER DENYING MOTION FOR EXTENSION OF TIME IN WHICH TO FILE NOTICE OF APPEAL

Case No. 980910104

Honorable Sandra N. Peuler

Defendant's Motion for Extension of Time in Which to File Notice of Appeal came regularly before the Honorable Sandra N. Peuler, on August 30, 1999. The Court, having reviewed the memoranda and pleadings submitted by the parties and having announced its decision regarding the motion in a minute entry, and good cause appearing therefor,

THE COURT FINDS AND CONCLUDES as follows:

A. Defendant knew that the Court had grant Summary Judgment on or about July 11, 1999.

B. Defendant knew that plaintiff had submitted a proposed Order on summary judgment on or about January 23, 1999.

C. Despite this knowledge, defendant failed to check with the clerk for a period in excess of thirty (30) days to see whether the order had been executed by the Court.

D. Although the late filing does not appear to have prejudice the plaintiff, the length of delay was not substantial, and there is no evidence that defendant acted in bad faith, defendant's delay in checking with the Court and timely filing its appeal does not appear to have been beyond the control of the defendant.

E. Defendant's delay for more than thirty (30) days to see whether the Court had entered the proposed order was neglect.

F. Defendant's neglect in failing to timely file its appeal is not excusable.

Therefore, THE COURT ORDERS as follows:

Defendant's Motion for Extension of Time in Which to File Notice of Appeal is hereby denied.

MADE AND ENTERED this 9 day of September, 1999.

BY THE COURT:

SANDRA N. P
Third Judicial D

APPROVED AS TO FORM:

Brian W. Steffensen

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of September, I caused a true and correct copy of the foregoing **ORDER DENYING MOTION FOR EXTENSION OF TIME IN WHICH TO FILE NOTICE OF APPEAL** to be served by regular mail, via United States Postal Service, postage prepaid, on the following:

Brian W. Steffensen
STEFFENSEN, McDONALD & STEFFENSEN
2159 South 700 East, Suite 100
Salt Lake City, Utah 84106

Brian W. Steffensen, P.C. (3092)
Steffensen ❖ McDonald ❖ Steffensen
2159 S. 700 E., Suite 100
Salt Lake City, UT 84106
Tel: (801) 485-3707
Fax: (801) 485-7140

Attorney for Defendant the Robertson Family Trust

IN THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH

PAINEWEBBER, INC., a Delaware Corporation, KIDDER PEABODY & CO., INC., a Delaware Corporation, and VAN FRANCIS DUNN, JR., an individual,

Plaintiffs,

vs.

The ROBERTSON FAMILY TRUST, by and through JAMES L. ROBERTSON, Trustee,

Defendant.

DEFENDANTS' MOTION FOR RECONSIDERATION RE THEIR MOTION FOR AN EXTENSION OF TIME IN WHICH TO FILE NOTICE OF APPEAL AND OBJECTION TO PROPOSED ORDER

And Request for Hearing

Civil No. 980910104

Judge Sandra Peuler (originally assigned to Judge Fuchs and reassigned to Judge Peuler)

In issuing its ruling on Defendants' Motion for an Extension of Time in Which to File Notice of Appeal, the Court based its denial of said motion on the erroneous assumption of fact that Defendants had not inquired as to the execution of the order within the thirty (30) day appeal time period -- and ruled that this was not "excusable neglect."

The true facts are, as outlined in the attached affidavit which was filed with the Utah

Supreme Court, as follows:

1. Defendants counsel inquired as to the execution of the order on or about March 9, 1999 -- the 29th day.

2. A Clerk of Court told Defendants' counsel that the order had been executed on February 10, 1999. This was in error, but Defendants' counsel relied upon it.

3. The Notice of Appeal was drafted and staff instructed to file it on March 10, 1999. However, thinking that there was no rush, the Notice of Appeal was not actually filed with the Court until the next day, March 11, 1999.

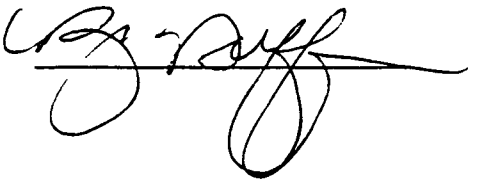
Since the true facts are that Defendants did inquire as to the date of execution within the thirty day time period, but were given inaccurate information which caused them to miss the deadline by a single day, Defendants respectfully request that the Court reconsider its denial of the Motion for Extension. The actions of Defendants in these regards constituted excusable neglect and justice and equity demand that they be allowed to proceed with their appeal.

These facts, plus the case law cited in Defendants moving papers, support the granting of the motion in question.

Defendants object to the proposed Order being signed until their Motion for Reconsideration is resolved.

Defendants request a hearing on their Motion for Reconsideration.

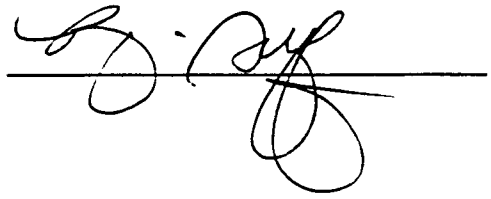
DATED this 13th day of September, 1999.



CERTIFICATE OF SERVICE

I hereby certify that I mailed a copy of the foregoing paper this 13th day of September, 1999, via the United States Mail, postage prepaid, to:

Bryon J. Benevento
Robert W. Payne
SNELL & WILMER, L.L.P.
111 East Broadway, Suite 900
Salt Lake City, UT 84111



Brian W. Steffensen, P.C. (3092)
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2159 South 700 East, Suite 100
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Tel: (801) 485-3707
Fax: (801) 485-7140

Attorney for Defendant and Appellant The Robertson Family Trust

IN THE UTAH SUPREME COURT

PAINEWEBBER, INC., a Delaware Corporation, KIDDER PEABODY & CO., INC., a Delaware Corporation, and VAN FRANCIS DUNN, JR., an individual,

Plaintiffs/Appellees,

vs.

The ROBERTSON FAMILY TRUST, by and through JAMES L. ROBERTSON, Trustee,

Defendant/Appellant.

AFFIDAVIT OF BRIAN W. STEFFENSEN IN OPPOSITION TO MOTION FOR SUMMARY DISPOSITION

Civil Case No. 980910104
Honorable Dennis M. Fuchs

Case No. 990261-SC

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

Brian Steffensen, being first duly sworn and under oath, testifies as follows:

1. I am over the age of 21 years, I am of sound mind, and I give the testimony in this affidavit of my own free will. I am a member in good standing of the Utah State Bar Association,

and I am the attorney for defendant/appellant The Robertson Family Trust (the "Robertson Family")in the above-captioned case. I have personal knowledge of the facts contained in this affidavit.

2. On or about March 9, 1999, I called JUDGE FUCHS' clerk at the Third Judicial District Court of Salt Lake County and inquired if the District Court had entered its Findings of Fact, Conclusions of Law, Order And Judgment Granting Summary Judgment in the above-entitled action. I made this inquiry because I had not received an Order issued by the District Court even though the plaintiffs/appellees had filed their proposed form of Order with the Court. At that time, the clerk informed me that the Court had issued its Findings of Fact, Conclusions of Law, Order and Judgment Granting Summary Judgment on February 10, 1999 (the "Final Order"). Because the District Court did not send to me a copy of the Final Order, I had not previously been aware that the Court had issued the Final Order.

3. Therefore, based on the representation of the District Court's Clerk, I calculated that the Robertson Family had thirty days from February 10, 1999, in which to file a Notice of Appeal to appeal the District Court's rulings and orders in this action. Thus, it was my understanding that the Robertson Family had until March 12, 1999 in which to file its Notice of Appeal. Therefore, I executed a Notice of Appeal and gave it to my secretary for filing on Wednesday, March 10, 1999, instructing her to file it with the District Court that day and pay the appropriate filing fee. However, my secretary apparently did not file the Notice of Appeal with the District Court until the next day, March 11, 1999, because she did not believe that the deadline for filing would run until Friday, March 12, 1999.

4. I assumed that when my messenger filed the Notice of Appeal with the District Court, that

the appropriate filing fee was also paid. This is because I instructed my staff to pay the fee, and because the office of the Clerk of the District Court accepted the Notice of Appeal and filed the same. In my experience, whenever we have presented a filing requiring a fee without a check, the filing has not been accepted. I usually have received a call right then and asked to send down a check. However, on March 18, 1999, Wendy Purnell, the front office clerk of the Judge Fuchs, telephoned me and told me that she could not docket the Robertson Family's Notice of Appeal because the requisite filing fee had not been filed. Therefore, I immediately filed an Amended Notice of Appeal on March 18, 1999, and filed it with the District Court along with the requisite filing fee.

DATED this ____ day of September, 1999.

S/BWS
Brian W. Steffensen
Attorney for Defendant/Appellant
The Robertson Family Trust

SUBSCRIBED AND SWORN TO before me this _____ day of May, 1999.

S/GL
NOTARY PUBLIC

Residing at: _____

My Commission Expires:

_____

CERTIFICATE OF SERVICE

I hereby certify that I mailed a copy of the foregoing paper this_____ day of September, 1999, via the United States Postal Service, postage prepaid, to:

Bryon J. Benevento
Robert W. Payne
SNELL & WILMER, L.L.P.
111 East Broadway, Suite 900
Salt Lake City, UT 84111

S/Brian
Brian W. Steffensen

Robert W. Payne (5334)
SNELL & WILMER L.L.P
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Salt Lake City, UT 84111
Telephone: (801)237-1900
Facsimile: (801)237-1950

Attorneys for Plaintiffs

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

PAINEWEBBER, INC., a Delaware corporation, KIDDER, PEABODY & CO. INC., a Delaware corporation, and VAN FRANCIS DUNN, JR., an individual,

Plaintiffs,

vs.

The ROBERTSON FAMILY TRUST, by and through JAMES L. ROBERTSON, Trustee,

Defendant.

ORDER DENYING MOTION TO RECONSIDER

Case No. 980910104

Honorable Sandra N. Peuler

Defendant's Motion for Reconsideration re their Motion for an Extension of Time in Which to File Notice of Appeal came regularly before the Honorable Sandra N. Peuler, on November __, 1999. The Court, having reviewed the memoranda and pleadings submitted by the parties, and good cause appearing therefor,

THE COURT FINDS AND CONCLUDES as follows:

A. Defendant did not submit a timely objection to defendants' proposed Order Denying Motion for Extension of Time in Which to File Notice of Appeal as permitted by Rule 4-504 of the Utah Code of Judicial Administration.

B. On September 9, 1999, the Court entered its Order Denying Motion for Extension of Time in Which to File Notice of Appeal.

C. On September 13, 1999, plaintiff submitted a Motion for Reconsideration re their Motion for an Extension of Time in Which to File Notice of Appeal.

D. Motions to reconsider are not provided for under the Utah Rules of Civil Procedure and have never been recognized as a proper motion in this state.

E. The arguments set forth in plaintiff's motion to reconsider are not persuasive.

THEREFORE, the Court declines plaintiff's invitation to reconsider its September 9, 1999, Order Denying Motion for Extension of Time in Which to File Notice of Appeal.

MADE AND ENTERED this 8 day of Dec November, 1999.

BY THE COURT:

Sandra Peuler

SANDRA N. PEULER
Third Judicial District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of November, 1999, I caused a true and correct copy of the foregoing proposed **ORDER DENYING MOTION TO RECONSIDER** to be served, via United States Postal Service, postage prepaid, on the following:

Brian W. Steffensen
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